Hong Leong Finance Bhd v Rajandram

HIGH COURT (MELAKA) — CIVIL APPEAL NO 12–4 OF 1998
AUGUSTINE PAUL J
31 JULY 1998

Hire Purchase *— Repossession — Failure to give notice pursuant to s 18(1)(a) of the Hire Purchase Act 1967 — Vehicle repossessed and re-delivered after payment made — Whether notice mandatory —Whether agreement continues as if breach did not occur — Whether liability of guarantor continues — Hire Purchase Act 1967 ss 19(1) & 21(2)*

The plaintiff entered into a hire-purchase agreement with the first defendant which was guaranteed by the second defendant. The first defendant defaulted and the plaintiff issued notices to repossess the vehicle in accordance with the Hire Purchase Act 1967 ('the Act'). On 23 November 1995, the plaintiff repossessed the vehicle. On 18 December 1995, the first defendant paid all the arrears instalments and other charges and the vehicle was returned to him. Though the payment was made within 21 days of the service of the Fifth Schedule notice, the first defendant did not give written notice to the plaintiff as required by s 18(1)(a) of the Act. On 19 December 1995, upon its own inquiry, the second defendant was informed that the first defendant had already redeemed the vehicle. Thereupon, on 28 December 1995, the second defendant gave notice to the plaintiff that he was discharging himself as a guarantor. The plaintiff replied that the second defendant could only do so upon full settlement of the amount due under the agreement. The first defendant again subsequently defaulted in his payments. Consequently, the plaintiff filed an action against both defendants.

The sessions judge dismissed the plaintiff's claim on the ground that the agreement was terminated by the plaintiff when the vehicle was repossessed on 23 November 1995 and that the guarantee had lapsed then because the first defendant did not give notice to the plaintiff pursuant to s 18(1)(a) of the Act when he tendered payment on 18 December 1995. The plaintiff appealed. The issue for determination was whether the liability of the second defendant was discharged when the vehicle was repossessed followed by the re-delivery to the first defendant without the notice required by s 18(1)(a) of the Act by the first defendant.

Held, dismissing the appeal:

The notice required by s 18(1)(a) of the Act would be mandatory in order for the agreement to be treated as continuing pursuant to s 19(1) of the Act. As no such notice was given, the first defendant did not hold the vehicle pursuant to the terms of the agreement as if the breach had not occurred. Thus, the liability of the respondent was discharged when the vehicle was re-delivered to the first defendant (see p 417E-H).

[Bahasa Malaysia summary

Plaintif telah memasuki suatu perjanjian sewa beli dengan defendan pertama yang dijamin oleh defendan kedua. Defendan pertama telah mungkir dan plaintif telah mengeluarkan notis-notis untuk memiliki semula kenderaan tersebut menurut Akta Sewa Beli 1967 ('Akta tersebut'). Pada 23 November 1995, plaintif telah memiliki semula kenderaan tersebut. Pada 18 November 1995, defendan pertama telah membayar semua tunggakan ansuran dan lain-lain caj dan kenderaan tersebut telah dikembalikan kepada beliau. Walaupun pembayaran tersebut adalah dibuat dalam jangka masa 21 hari daripada penyampaian notis Jadual Kelima, defendan pertama tidak memberikan suatu notis bertulis kepada plaintif seperti mana yang dikehendaki oleh s 18(1)(a) Akta tersebut. Pada 19 Disember 1995, melalui siasatan sendiri oleh defendan kedua, defendan kedua telah diberitahu bahawa defendan pertama telah menebus kenderaan tersebut. Maka, pada 28 Disember 1995, defendan kedua telah memberi notis kepada plaintif bahawa beliau telah melepaskan dirinya sebagai penjamin. Plaintif menjawab bahawa defendan kedua hanya boleh berbuat demikian apabila terdapat penyelesaian sepenuh bagi jumlah yang sepatutnya di bawah perjanjian tersebut. Defendan pertama sekali lagi kemudiannya mungkir dalam pembayarannya. Akibatnya, plaintif memfailkan suatu tindakan terhadap kedua-dua defendan-defendan tersebut.

Hakim mahkamah sesyen telah menolak tuntutan plaintif atas alasan bahawa perjanjian tersebut telah ditamatkan oleh plaintif apabila kenderaan tersebut telah dimiliki kembali pada 23 November 1995 dan bahawa gerenti tersebut telah luput pada masa itu kerana defendan pertama tidak memberi notis kepada plaintif menurut s 18(1)(a) Akta tersebut apabila beliau memberikan pembayaran pada 18 Disember 1995. Plaintif merayu. Isu untuk ditentukan adalah sama ada liabiliti defendan kedua adalah dilepaskan apabila kenderaan tersebut dimiliki semula dan diikuti dengan penghantaran semula kepada defendan pertama tanpa notis seperti yang diperlukan menurut s 18(1)(a) Akta tersebut oleh defendan pertama.

Diputuskan, menolak rayuan tersebut:

Notis yang diperlukan oleh s 18(1)(a) Akta tersebut adalah mandatori untuk menjadikan perjanjian tersebut dianggap sebagai berterusan menurut s 19(1) Akta tersebut. Memandangkan bahawa tiada notis sedemikan telah diberikan, defendan pertama adalah tidak memegang kenderaan tersebut mengikut terma-terma perjanjian tersebut seolah-olah kemungkiran tersebut tidak pernah berlaku. Maka, liabiliti responden tersebut adalah dilepaskan apabila kenderaan tersebut dihantar semula kepada defendan pertama (lihat ms 417E–H).]

A **Notes**

For cases on repossession generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 2375–2389.

B **Cases referred to**

Graham v Attorney General [1966] NZLR 954 (refd)
Harris & Anor v Lombard New Zealand Ltd & Anor [1974] 2 NZLR 161 (refd)
Kekatong Sdn Bhd v Bank Bumiputera (M) Bhd [1998] 2 MLJ 440 (refd)
C *Nichol v Thompson* (1976) 12 ALR 528 (refd)
State of Punjab v Kartar Singh Grewal (1977) 79 Punj LR 311 (DB) (refd)
Thambipillai v Borneo Motors (M) Ltd [1970] 1 MLJ 70 (refd)
Uttar Pradesh v Jogendra Singh [1964] 2 SCR 197 (refd)
Woodward v Sarsons (1875) LR 10 CP 733 (refd)
D

Legislation referred to

Hire Purchase Act 1967 ss 16(3), 18(1)(a), 19(1)(c), 21(2)

Khairil Aznan Azizi (*Andrew TS Goh & Co*) for the plaintiff.
E *Ravinathan Muthiah* (*Ravi Muthiah & Co*) for the defendants.

Augustine Paul J: The dominant issue for determination in this appeal is the effect of re-delivery of goods that have been repossessed by the owner to the hirer when the hirer has not given notice in writing for such re-delivery as prescribed by the Hire Purchase Act 1967 ('the Act'). All references in
F this judgement to provisions of law shall be to sections of the Act.

On 20 June 1995 Hong Leong Finance Bhd (the plaintiff in the court below and the appellant before me) entered into a hire-purchase agreement ('the agreement') with one Unni a/l V Baskaran (the first defendant in the Court below) for the letting on hire-purchase of a motor car bearing
G registration number JCX 1633 ('the motor car'). The performance of the agreement was guaranteed by one Rajandram a/l A Ramaiah (the second defendant in the Court below and the respondent before me) by a guarantee of hire purchase agreement ('the guarantee agreement'). The first defendant paid only one instalment and defaulted in making the subsequent payments. As a result the appellant issued the necessary notices to repossess
H the motor car in accordance with the requirements of the Act and repossess it with the help of the respondent on 23 November 1995. On 28 November 1995, the appellant issued a Fifth Schedule Notice to the first defendant and the respondent pursuant to s 16(3). The first defendant was given two options to secure the return of the motor car. He was either to update all the arrears of instalments and other charges or to finalize the agreement and pay
I the balance due. The first defendant was given time till 19 December 1995 to exercise the option, that is to say, a period of 21 days. On 4 December 1995, the respondent informed the appellant that he has a ready buyer to

purchase the motor car. On 12 December 1995, the appellant informed the respondent that it cannot agree to the request as only the first defendant could exercise such an option. On 18 December 1995, the first defendant paid all the arrears of instalments and other charges to the appellant and on the same day the appellant returned the motor car back to the first defendant. Though the first defendant made the payment within 21 days after service on him of the Fifth Schedule Notice he did not give the written notice to the appellant as stipulated in s 18(1)(a). On 19 December 1995, the appellant received a letter from the respondent saying that he has found a buyer for the car. On 26 December 1995, the appellant informed the respondent that the first defendant had redeemed the motor car. On 28 December 1995, the respondent gave notice to the appellant to the effect that he had discharged himself as guarantor. The appellant replied saying that the respondent could only do so upon full settlement of the amount due under the agreement. After the release of the motor car to him the first defendant again defaulted in the payment of the instalments. The appellant issued notices of demand to the first defendant and the respondent. They did not respond. On 16 April 1996, the appellant demanded payment of the sum of RM48,938.58 from them being the amount due and payable under the agreement and the guarantee agreement. Since they did not respond to the demand the appellant filed an action against both of them in the sessions court for the recovery of the sum due.

The learned sessions court judge dismissed the claim with costs. This appeal is against that order. In his grounds of judgment the learned sessions court judge said that the agreement was terminated by the appellant when it repossessed the motor car on 23 November 1995. Accordingly, he said, the guarantee agreement also lapsed on the same date. He added that the respondent was liable to the appellant for the sum due as of 23 November 1995. In other words, he said, the liability of the respondent on that date would have been reduced by the value of the motor car in the possession of the appellant. He then said that the respondent is not answerable for liabilities arising after 23 November 1995 as a new agreement had come into existence when the appellant released the motor car to the first defendant following the termination of the agreement. In outlining the instances when an earlier agreement is deemed not to have been terminated the learned sessions court judge said:

> The only situation in which the earlier agreement is deemed not terminated is provided for by s 19(1)(c). Firstly, s 18(1)(a) of the Act states that where the owner takes possession of goods under s 16, the hirer may within (21) days after the service on him of a s 16(3) notice, give the owner a notice in writing signed by the hirer or his agents, to require the owner to redeliver the goods to him. Secondly, by virtue of s 19(1), if the hirer within the (21) days, after giving the s 18(1)(a) notice, pays the amount due, the owner shall forthwith return the goods to the hirer pursuant to the terms of the hire purchase agreement as if the breach had not occurred and the owner had not taken possession thereof.
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> In the instant case, the parties agreed that the hirer did not give the s 18(1)(a) notice to the plaintiff when the plaintiff accepted the payment and released the vehicle.

Hence, the hirer tendered payment without complying with s 18(1)(a) and as such, it cannot be said the vehicle was returned to the hirer as if the breach had not occurred and the owner had not taken possession thereof.

The plaintiff's claim against the second defendant for a sum of RM48,932.58 is based on liability existing as at 13 April 1996. This liability arose, after the vehicle was released on 18 December 1995 under a new agreement and to date the plaintiff is unable to locate the said vehicle.

By virtue of s 21(2) of the said Act, the second defendant as guarantor is not liable for the sum of RM48,938.52 as the said liability arises from a new agreement in respect of the said vehicle and s 21(2) does not operate to preserve the liability of the guarantor, in respect of this new liability.

In his submission before me learned counsel for the appellant contended that the learned sessions court judge had erred in law in finding that the repossession of the motor car had the effect of terminating the agreement. He said that the repossession was carried out pursuant to s 16 and cl 9.1 of the agreement which reads as follows:

> 9.1 Subject to the owner complying with the provisions of the Act in the case of any breach of the provisions of this Agreement relating to the payment of instalments, if the hirer shall default in payment of any other sums due under this agreement or if the hirer shall fail to observe or perform any of the other items and conditions of this agreement or ... , then and in any of the said events, without prejudice to the rights and claims which the owner may have against the hirer, the owner shall be entitled to immediate possession of the goods and, the owner may either immediately terminate the hiring without notice and resume possession of the goods including the documents and thereafter if the owner has taken possession of the goods under s 16 of the Act, ss 16A to 19 of the Act shall apply/or by written notice sent by post or left at the hirer's address stated in this Agreement or at the hirer's last known address forthwith determine and end this agreement and the hiring thereby constituted and thereupon the hirer shall no longer be in possession of the goods with the owner's consent and the hirer shall deliver up possession of the goods including the documents to the owner at the address specified in the said notice.

Learned counsel said that if there is a default in the payment of instalments by the first defendant the appellant has the option of either terminating the hiring without notice and resume possession of the motor car or determine the agreement and the hiring thereby constituted by a written notice. Learned counsel said that the appellant exercised the first option as provided by Cl 9.1 and that what was terminated was the hiring and not the agreement itself. This is due to the fact that a hire-purchase agreement is a bailment coupled with an option to purchase. In support he referred to *Thambipillai v Borneo Motors (M) Ltd* [1970] 1 MLJ 70. He said that if the first defendant complies with s 19(1) after repossession the breach shall be treated as if it had not occurred. He then said that non-compliance with s 18(1)(a) is not fatal as it is only directory and referred to *Harris & Anor v Lombard New Zealand Ltd & Anor* [1974] 2 NZLR 161. In his reply learned counsel for the respondent contented that the notice in writing required by s 18(1)(a) is mandatory. He said that if this notice is not given then the agreement which has been terminated by the repossession is not revived by s 19. As no such notice was

given he said that there was a new agreement within the meaning of s 21(2) thereby discharging the liability of the respondent. A

In my opinion the issue for determination in this appeal is whether the liability of the respondent, being a guarantor to the agreement, was discharged as a result of the repossession of the motor car by the appellant followed by its re-delivery to the first defendant without him having given the notice in writing described in s 18(1)(a). Clause 9.1 of the agreement stipulates that where there is termination of the hiring without notice and the owner has taken possession of the goods under s 16 of the Act then s 16A to 19 of the Act shall apply. Thus, there must be compliance with these sections in this case. B

The right of an owner to take possession of goods comprised in a hire-purchase agreement is governed by s 16. Of special significance are the Fourth Schedule Notice and the Fifth Schedule Notice which the owner must serve on the hirer as prescribed by sub-ss (1) and (3) of s 16 respectively. Section 18 deals with the rights of the hirer when the goods have been repossessed. In particular s 18(1) provides as follows: C D

> 18 (1) Where the owner takes possession of any goods under s 16 —
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> (a) the hirer may within twenty-one days after the service on him of the notice referred to in s 16(3) by giving to the owner a notice in writing signed by the hirer or his agent —
>
> (i) require the owner to re-deliver to or to the order of the hirer (subject to the compliance by the hirer with the provisions of section 19) the goods that have been repossessed or E
>
> (ii) require the owner to sell the goods to any person introduced by the hirer who is prepared to buy the goods for cash at a price not less than the estimated value of the goods set out in the first mentioned notice.

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This section deals with the notice in writing that the hirer must give the owner when he requires the latter to act as specified. I shall deal with this in more detail in a later part of the judgment. Section 17 prescribes the period of time for which the owner must retain possession of the goods that have been repossessed. The sections reads as follows:

> 17 (1) Where an owner has taken possession of any goods under section 16 he shall not, without the written consent of the hirer, sell or dispose of the goods or part with possession thereof until after the expiration of twenty-one days after the date of the service on the hirer of the notice referred to in section 16(3) or, if notice under section 18(1)(a) has been given, until the time for payment or tender pursuant to that notice has expired (whichever is the later). G H
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> (2) An owner who sells or disposes of any goods or parts with possession of any goods in contravention of subsection (1) shall be guilty of an offence under this Act.

Section 19 prescribes the time period within which the hirer may redeem the goods. The material parts of the section read as follows: I

> 19 (1) If, within twenty-one days after giving notice to the owner pursuant to the provisions of sections 18(1)(a), the hirer —

A (a) pays or tenders to the owner any amount due by the hirer under the hire-purchase agreement in respect of the period of hiring up to the date of the payment or tender (and for the purposes of this paragraph the hiring shall be deemed to have continued up to that date);

B (b) remedies any breach of the agreement or (where he is unable to remedy the breach by reason of the fact that the owner has taken possession of the goods) pays or tenders to the owner the costs and expenses reasonably and actually incurred by the owner in doing any act, matter, or thing necessary to remedy the breach; and

C (c) pays or tenders to the owner the reasonable costs and expenses of the owner of and incidental to his taking possession of the goods and of his returning them to the hirer,

the owner shall forthwith return the goods to the hirer and the goods shall be received and held by the hirer pursuant to the terms of the hire-purchase agreement as if the breach had not occurred and the owner had not taken possession thereof.

D

Thus where the hirer has regained possession of the goods as prescribed by s 19(1) the goods shall be held by the hirer pursuant to the terms of the hire-purchase agreement as if the breach had not occurred and the owner has not taken possession thereof. In that event the hire-purchase agreement will not lapse and, accordingly, the liability of the guarantor will continue as E provided by s 21(2). It follows that in such circumtances the repossession of the goods and their subsequent re-delivery will not amount to a new agreement between the owner and the hirer. However, it is significant to note that the foundation of s 19(1) is the giving of the notice in writing by the hirer to the owner as stipulated by s 18(1)(a).

F The resultant matter for consideration is whether a re-delivery of goods that have been repossessed when the hirer has not given the notice in writing amounts to a continuation of the hire purchase agreement. This would depend on whether the requirement to give the notice in writing under s 18(1)(a) is mandatory or directory. In resolving this issue the use of the word 'may' in the section is important. The word may appear to suggest that the provision is G directory. However, the use of the word 'may' in a statute is not decisive and other relevant provisions which can throw light on its interpretation have to be looked into in order to find out whether the character of the provision is mandatory or directory (see *Hukam Singh v State of Punjab* [1976] Cr LT (FB); *State of Punjab v Kartar Singh Grewal* (1977) 79 Punj LR 311 (DB)). In such a H case the legislative intent in so framing the provision has to be determined (see *Uttar Pradesh v Jogendra Singh* [1964] 2 SCR 197). In this regard I refer to *Kekatong Sdn Bhd v Bank Bumiputra (M) Bhd* [1998] 2 MLJ 440 where Gopal Sri Ram JCA in writing for the Court of Appeal said at pp 453–454:

I First, it has been recognized by high authority that when a provision in a statute uses permissive language such as 'may' it is a question of legislative intent, dependent upon a number of factors, whether the intended result is mandatory or directory. As Lord Campbell CJ said in *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379 at p 380:

> 'No universal rule can be laid down ... . It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statue to be construed.'

Again, in *Howard v Bodington* (1877) 2 PD 203 at p 211, Lord Penzance said:

> 'I believe, as far as any rule is concerned, you cannot safely go further than that in each case you must look to the subject-matter, consider the importance of the provision and the relation of that provision to the general object intended to be secured by the Act, and upon a review of the case in that aspect decide whether the enactment is what is called imperative or only directory ...
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> I have been very carefully through all the principal cases but upon reading them all, the conclusion at which I am constrained to arrive is this, that you cannot glean a great deal that is very decisive from a perusal of these cases. They are on all sorts of subjects. It is very difficult to group them together, and the tendency of my mind, after reading them, is to come to the conclusion which was expressed by Lord Campbell in the case of *Liverpool Borough Bank v Turner* (1860) 30 LJ Ch 379.'

We do not apprehend the approach to statutory interpretation formulated in the cases cited above to have altered or modified through passage of time. And no authority was cited to us during argument to suggest anything to the contrary.

It is therefore wrong to assume as a matter of course that whenever Parliament uses the word 'may' in a statute it never means 'must'.

It must also be observed that it is possible to have a provision which is in part mandatory and in part directory (see *Nichol v Thompson* (1976) 12 ALR 528). In addition there is authority for the proposition that some provisions in a statute may be mandatory while other inter-related provisions may be directory (see *Woodward v Sarsons* (1875) LR 10 CP 733; *Graham v A-G* [1966] NZLR 937).

I shall now consider whether the requirement to give the notice in writing as provided by s 18(1)(a) is mandatory or directory or part mandatory and part directory in nature against the background of the law that I have adverted to. In my opinion the need to give the notice in writing depends on the intention of the parties once the goods hired have been repossessed. If the hirer does not wish to proceed under s 18(1)(a)(i) or (ii) he need not give the notice. That is obvious as in such circumstances there will be no purpose in giving the notice as the owner may proceed to sell or dispose of the goods 21 days after service of the Fifth Schedule Notice as provided by s 17(1). In that event the owner is not concerned with the period specified in s 18(1)(a) as s 17(1) says that this period is to be taken into account only '...if notice under s 18(1)(a) has been given ...'. The notice is also not required if the owner and the hirer act under s 18(1)(a)(i) and (ii) through a private arrangement resulting in the owner renouncing certain benefits in his favour. As I will demonstrate shortly compliance with the relevant provisions of the Act will ensure continuance of the hire-purchase agreement to the benefit of the owner as the liability of the guarantor will continue. The private arrangement would in effect mean that the parties have contracted out of a statutory provision. This is permissible. In this regard *Statutory Interpretation* by Bennion (7th Ed) says at p 35:

> Where the case is within the principle *quilibet potest renuntiare juri pro se introducto* (a party may renounce a right introduced for his benefit), a person entitled to the performance of a statutory duty can effectively waive performance of the duty by the person bound, and that person can effectively contract out of performing the duty.

To that extent the obligation to give the notice in writing is directory. Where, however, the hirer wishes to compel the owner to act under s 18(1)(a)(i) and (ii) and/or if it is intended to treat the hire-purchase agreement as continuing pursuant to s 19(1) then the notice in writing as required by s 18(1)(a) must be given. This construction flows from reading s 18(1)(a) with s 19(1) both of which are inter-dependent. Section 19(1) provides a time period of 21 days after giving the notice in writing prescribed by s 18(1)(a) during which the hirer may redeem the goods. It is superfluous to state that this time period cannot begin to run unless the notice specified in s 18(1)(a) has been given. Thus the giving of the notice in writing is a condition precedent for the activation of s 19(1). Section 19(1) cannot therefore function without the aid of s 18(1)(a). If the section is not activated any right conferred by it cannot accrue. It is also a rule of construction that conditions attached to a statutory right or benefit, which did not exist at common law as in this case, are mandatory. In this regard *Statutory Interpretation* by Bennion (7th Ed) says at p 32:

> Where a legislation confers some right or benefit on a person which he would not have at common law, the conditions laid down as to the accrual of the right or benefit, unless purely formal, are mandatory. If they are not complied with the right or benefit will not accrue.

Thus the notice under s 18(1)(a) must be given if it is desired to have the hire-purchase agreement treated as continuing as if the breach had not occurred and the owner had not taken possession thereof as provided by s 19(1). To that extent the requirement to give the notice in writing is mandatory in order to secure the right conferred by s 19(1). The need to give the notice in writing is therefore part directory and part mandatory. I pause to add that the case of *Harris & Anor v Lombard New Zealand Ltd & Anor* [1974] 2 NZLR 161, relied on by learned counsel for the appellant, is not relevant as it was not concerned with the issue involved in this case.

In this case no notice in writing as required by s 18(1)(a) was given when the motor car was re-delivered to the first defendant. Thus the right conferred by s 19(1) does not accrue with the result that the first defendant did not hold the motor car pursuant to the terms of the agreement as if the breach had not occurred and the appellant had not taken possession thereof. The liability of the respondent was therefore discharged when the motor car was re-delivered to the first defendant.

In the upshot I dismiss the appeal with costs.

Appeal dismissed.

Reported by Chin En Tek